1989

Patrick R. Donahue v. John C. Durfee; Delta Valley Foods, a Utah corporation; Larry howell; Utah Power and Light Company, a Utah corporation; and ABCO Construction Corp., a Utah corporation : Response to Petition for Rehearing

Utah Supreme Court

W. Brent Wilcox, Edward B. Havas; Giauque and Williams, Wilcox & Bendinger; attorneys for appellant.
Robert B. Hansen; attorney for petitioner.

BRIEF

IN THE UTAH SUPREME COURT

PATRICK R. DONAHUE, Plaintiff/Appellant, v. JOHN C. DURFEE; DELTA VALLEY FOODS, a Utah corporation; LARRY HOWELL; UTAH POWER & LIGHT COMPANY, a Utah corporation; and ABCO CONSTRUCTION CORP., a Utah corporation, Defendants/Respondents	)	CASE NO. 890454 PRIORITY 13

PLAINTIFF/APPELLANT PATRICK DONAHUE'S BRIEF IN OPPOSITION TO RESPONDENT HOWELL'S PETITION FOR A WRIT OF CERTIORARI

Petition for Review of Decision of
Utah Court of Appeals, Case No. 880227-CA

Hon. Gregory K. Orme
Hon. Russell W. Bench
Hon. Regnal W. Garff
Judges of the Utah Court of Appeals

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PLAINTIFF/APPELLANT PATRICK DONAHUE'S BRIEF IN OPPOSITION TO RESPONDENT HOWELL'S PETITION FOR A WRIT OF CERTIORARI

QUESTION PRESENTED FOR REVIEW

Should this Court grant a writ of certiorari to review the Court of Appeals decision holding that the "open and obvious danger" rule, applied as an absolute bar to recovery, is anachronistic and inappropriate in light of the adoption and application of Utah's comparative negligence scheme?

REPORT OF OPINION

The subject decision has been published in 118 Utah Adv. Rep. 64 (Ct. App. filed September 28, 1989); slip op. No. 8800227-CA.

JURISDICTION

The decision of the Court of Appeals was entered on September 28, 1989. Plaintiff/appellant Donahue does not dispute the Court's jurisdiction to review the Petition for Writ of Certiorari.

CONTROLLING PROVISIONS OF LAW

Utah Code Ann. § 78-27-37 (1973):[1]

> Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages for negligence or gross negligence resulting in death or in injury to person or property, if such negligence was not as great as the negligence or gross negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of negligence attributable to the person recovering. As used in this act, "contributory negligence" includes "assumption of the risk."

Utah Code Ann. §78-27-38 (1973):[1]

> The court may, and when requested by any party shall, direct the jury to find separate special verdicts determining (1) the total amount of damages suffered and (2) the percentage of negligence attributable to each party; and the court shall then reduce the amount of the damages in proportion to the amount of negligence attributable to the person seeking recovery.

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[1] The controlling provisions of law are stated as enacted at the time of plaintiff's injuries. These provisions have since been repealed and reenacted in a manner which eliminated joint and several liability but which does not otherwise alter the rationale urged by Donahue or adopted by the Court of Appeals. See, Utah Code Ann. §§ 78-27-37 and 38 (1986).

STATEMENT OF THE CASE

Plaintiff brought a negligence action against Delta Valley Foods (DVF), John C. Durfee, Larry Howell, ABCO Construction Corp. and Utah Power & Light[2] for injuries suffered when he came in contact with a 7200-volt high-tension power line in the course of his employment installing a rain gutter on DVF's warehouse. The District Court entered summary judgment in favor of DVF, Durfee and Howell, concluding that the power line constituted an open and obvious danger and, accordingly, that these defendants owed no duty to Donahue. The Court of Appeals reversed, holding that the application of the open and obvious danger rule, resulting in an absolute bar to recovery, was inappropriate and inconsistent with the Comparative Negligence Act.

STATEMENT OF FACTS

Donahue was injured on August 18, 1982 when, while installing rain gutter on DVF's warehouse, he came in contact with a 7200-volt power line which crossed over the warehouse construction site just a few feet above the building's rooftop. (R. 3-5; 118 Utah Adv. Rep. at 65.) As a result of the electrocution, Donahue fell from the roof approximately 25 to 30 feet to the ground. Donahue sustained both electrocution- and fall-related injuries. Id.

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[2] Plaintiff has settled with Utah Power & Light and ABCO; consequently they are not parties to this appeal.

Defendant Larry Howell, a steel building salesman, had been hired by DVF, through its general manager, defendant Durfee, to arrange the construction of the warehouse. (R. 663, pp. 26-28, 31-33, 39-41; 118 Utah Adv. Rep. at 65.) Howell procured the necessary building materials and arranged for a contractor, ABCO Construction Corporation, to erect the warehouse. (R. 663, pp. 64-65; 118 Utah Adv. Rep. at 65.) Near the completion of the warehouse erection, Donahue's employer, Mr. Rain Gutter, was retained to install guttering to promote appropriate water drainage from the roof. Id.

As noted above, the District Court granted summary judgment in favor of DVF, Durfee and Howell on the basis that they owed no duty to warn Donahue or otherwise protect him from the power line, as it constituted an open and obvious danger. (118 Utah Adv. Rep. 65.) The Court of Appeals reversed, determining that the open and obvious danger rule was an anachronism in the context of Utah's comparative negligence statute. (118 Utah Adv. Rep. 67). Defendant Howell now seeks a writ of certiorari to this Court.

ARGUMENT

Defendant Howell contends that the Court of Appeals decision is contrary to this Court's decision in Ellertson v. Dansie. 576 P.2d 867 (Utah 1978). In actuality, the Ellertson court did not state that the open and obvious danger rule

removed any duty on the part of the possessor of land. Rather, the court stated that "[w]here there is a dangerous condition on one's property, which is just as observable to an invitee as to the owner, the owner has no duty to warn or to protect the invitee except to observe the universal standard of reasonable care under the circumstances." 576 P.2d at 868 (emphasis added; footnote omitted). Although ambiguous, that language suggests that rather than having no duty at all, the duty is that suggested by appellant herein and the Court of Appeals below, that of reasonable care under the circumstances.

Further, a careful reading of the Ellertson case reveals that the decision was based not on the presence or absence of a duty, but on the issue of proximate cause. The court held that the plaintiff's conduct was "a later occurring, independent and intervening cause of his injury," and that there was "no basis upon which it could reasonably be found that any negligence on the part of the defendants was a proximate cause thereof." Id. (emphasis added). That the court's decision turned on proximate cause rather than duty is confirmed in the concluding paragraph, where the court stated ". . . we are not persuaded to disagree with the determination made by the trial court that there is no basis upon which it could be shown that any negligence of the defendants was a

direct, or immediate, or proximate, cause of the plaintiff's injury." Id.

Reference to the open and obvious danger rule generally relates back to Steele v. Denver & Rio Grande Western Railroad Co., 16 Utah 2d 127, 396 P.2d 751, 753-4 (1964), where the court stated: "Where the hazardous condition is as easily observable to the invitee as to the owner, the duty to warn does not exist . . . ." Id. at 753. However, that case was decided under the contributory negligence system, where any contributory negligence on the part of the plaintiff, regardless of how great or slight, served as a complete bar to plaintiff's recovery. As the Court of Appeals in this case noted, under a contributory negligence scheme it made little difference whether a known or obvious condition excused a land possessor's duty or simply insulated the possessor from liability for any breach of that duty. Donahue v. Durfee, 118 Utah Adv. Rep. 64, 66, citing Keller v. Holiday Inns, Inc., 105 Idaho 649, 671 P.2d 1112, 1118-19 (Ct. App. 1983), aff'd on other grounds, 107 Idaho 593, 691 P.2d 1208 (1984).

However, Utah has now abandoned its contributory negligence system in favor of a comparative negligence system, 118 Utah Adv. Rep. at 66; Utah Code Ann. § 78-27-38 (1973 and 1987). Interpreting the open and obvious danger rule to obviate a landowner's duty effectively resurrects the complete

bar to recovery sought to be alleviated by the adoption of a comparative negligence system. Just as this Court has declined to retain "all or nothing" doctrines such as assumption of the risk, last clear chance and discovered peril, see, Dixon v. Stewart, 658 P.2d 591, 598 (Utah 1982), and Moore v. Burton Lumber & Hardware Co., 631 P.2d 865, 871 (Utah 1981); see also, Donahue, 118 Utah Adv. Rep. at 67, so the Court of Appeals correctly determined that the open and obvious danger rule should not be retained as an absolute bar to recovery.

While there is language in Moore suggesting that there is no duty to warn of an obvious danger, 631 P.2d 868, the court in Moore was not required to address this issue since it determined that the hazard was not obvious. Id. As the Court of Appeals noted below, had the court in Moore addressed the issue, it almost certainly would have determined that there were no significant differences between the open and obvious danger rule and the assumption of risk doctrine which the court there abandoned; had it considered both it likely would have abandoned both under the comparative negligence system. See Donahue, 118 Utah Adv. Rep. at 68, n.3.

The Court of Appeals decision below is correct, well reasoned, and consistent with the direct holdings of this Court issued since the adoption of the Comparative Negligence Act. Since the Court of Appeals decision is correct and appropriate,

and is consistent with the status of the law since the adoption of the Comparative Negligence Act, it is unnecessary to grant certiorari in this case.

CONCLUSION

The Court of Appeals decision is correct and well reasoned and should not be disturbed. Defendant Howell's petition for writ of certiorari should be denied and the case permitted to return to the District Court for further disposition without additional delay.

Dated this 30th day of November, 1989,

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By 
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CERTIFICATE OF SERVICE

On this 30th day of November, 1989, four true copies of the foregoing Opposition to Petition for Certiorari were sent by first-class mail with postage thereon fully prepaid to:

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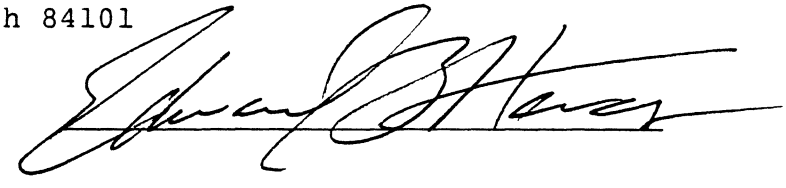

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IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR

SALT LAKE COUNTY, STATE OF UTAH

PATRICK R. DONAHUE, Plaintiff, vs. UTAH POWER AND LIGHT COMPANY, a Utah corporation; JOHN C. DURFEE, DELTA VALLEY FOODS, a Utah corporation; LARRY HOWELL, ABCO CONSTRUCTION CORPORATION, a Utah corporation Defendants.	AMENDED FINDINGS, CONCLUSIONS AND ORDER GRANTING SUMMARY JUDGMENT TO DEFENDANTS JOHN C. DURFEE AND DELTA VALLEY FOODS
UTAH POWER & LIGHT COMPANY, Third-Party Plaintiffs, vs. SANDY CITY CORPORATION, EUGENE STRICKLAND and DARRELL MARTIN, Third-Party Defendants,	Civil No. C84-4449 Honorable Pat B. Brian

The above-entitled matter came on for hearing before the above-entitled Court on Wednesday, the 14th day of October, 1987, pursuant to Motion for Summary Judgment filed by Defendants John C. Durfee and Delta Valley Foods, a Utah corporation, herein

APPENDIX 1

jointly referred to as "Durfee", the Honorable Pat B. Brian, judge, presiding. All parties appeared through their respective counsel of record. Counsel for Durfee argued the Motion which was responded to by counsel for Plaintiff. The Court, having reviewed the file, considered oral argument, and now being fully advised in the premises, makes and enters its uncontroverted:

FINDINGS OF MATERIAL FACT

1. Plaintiff was aware of the power lines above Durfee's building.

2. Plaintiff knew that the power lines were extremely dangerous and could cause severe injuries if touched.

3. Plaintiff had learned about electricity in school and on the job.

4. The risk of harm from the power lines was obvious to Plaintiff.

5. Plaintiff's employer was warned of the power lines by Durfee on the day of the accident when he pointed to the lines and said:

> "I don't know anything about electricity, but if it were me, I don't think I would climb up on that ladder."

6. Plaintiff was warned by his employer to be careful and not touch the wires.

7. Plaintiff warned a fellow employee of the dangers of the lines.

From the foregoing Findings of Material Fact, the Court makes and enters its:

CONCLUSIONS OF LAW

1. Plaintiff was an invitee on Durfee's property.

2. The power lines constituted an obvious danger of which Plaintiff was aware.

3. Durfee had no duty to warn Plaintiff of the obvious power line danger.

4. If such a duty existed, it was discharged when Durfee warned Plaintiff's employer.

From the foregoing Findings of Uncontroverted Material Fact and Conclusions of Law, the Court makes and enters its Judgment, as follows:

JUDGMENT

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Durfee is granted a "No Cause of Action" Judgment against Plaintiff, together with costs.

DATED this 12 day of November, 1987.

BY THE COURT:

PAT B. BRIAN
DISTRICT JUDGE

H. DIXON HINDLEY
CLERK
By Bradwell
Deputy Clerk

CERTIFICATE OF MAILING

I certify that I mailed a true and correct copy of the foregoing AMENDED FINDINGS, CONCLUSIONS AND ORDER GRANTING SUMMARY JUDGMENT TO DEFENDANTS JOHN C. DURFEE AND DELTA VALLEY FOODS, to the following-named individual via first-class mail, postage prepaid on this 13 day of October, 1987:

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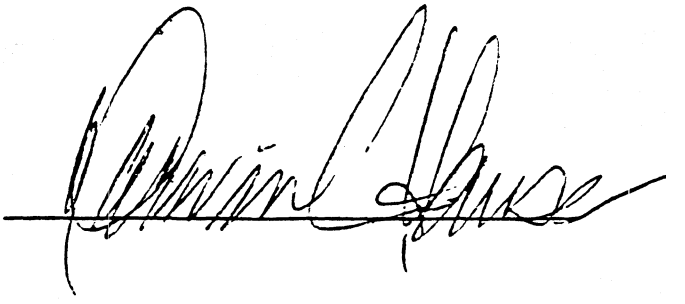

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IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR

SALT LAKE COUNTY, STATE OF UTAH

PATRICK C. DONAHUE, Plaintiff, vs. UTAH POWER & LIGHT COMPANY, a Utah Corporation, JOHN C. DURFEE, DELTA VALLEY FOODS, a Utah Corporation, LARRY HOWELL, ABCO CONSTRUCTION CORPORATION, a Utah Corporation, Defendants.	:	FINDINGS, CONCLUSIONS AND ORDER GRANTING SUMMARY JUDGMENT TO DEFENDANT LARRY HOWELL
UTAH POWER & LIGHT COMPANY, Third-Party Plaintiff, vs. SANDY CITY CORPORATION, EUGENE STRICKLAND, and DARRELL MARTIN, Third-Party Defendants.	: : : :	Civil No. C84-4449 Judge Pat B. Brian

The above-entitled matter came on for hearing before the above-entitled Court on Wednesday, the 14th day of October, 1987, pursuant to Motion for Summary Judgement filed by Defendant Larry Howell, the Honorable PAT B. BRIAN, judge presiding. All parties appeared through their respective counsel of record. Counsel of

Howell argued the Motion which was responded to by counsel for Plaintiff. The Court, having reviewed the file, considered oral argument, and now being fully advised in the premises, makes and enters its uncontroverted:

FINDINGS OF MATERIAL FACT

1. The subject power lines constituted an open, obvious, and plain-to-be-seen danger of which Plaintiff was fully aware.

2. Plaintiff was adequately warned of the power line danger through his employer Eugene Strickland.

From the foregoing Findings of Material Fact, the Court enters its:

CONCLUSIONS OF LAW

Howell's Motion for summary Judgment should be granted as a matter of law because:

1. Howell had no duty running in favor of Plaintiff in that the subject power lines constituted an open and obvious hazard; and

2. In the alternative, even if the power lines did not constitute an open and obvious hazard, Plaintiff was adequately warned of the danger by his employer Eugene Strickland.

From the foregoing Findings of Uncontroverted Material Fact and Conclusions of Law, the Court makes and enters its Order, as follows:

ORDER

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Howell is granted a "no cause of action" judgment against Plaintiff, together with costs.

Dated this 10 day of December, 1987.

BY THE COURT

PAT B. BRIAN
District Judge

MAILING CERTIFICATE

I certify that I mailed a true and correct copy of the foregoing Findings, Conclusions and Order Granting Summary Judgment to Defendant Howell, to the following-named individual by first-class mail, postage prepaid on this 2nd day of December, 1987.

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15. *See generally In re Independent Clearing House Co.*, 77 Bankr. 843, 868 (D. Utah 1987); *United States v. Gleneagles Inv. Co.*, 565 F. Supp. 556, 574 (D. Pa. 1983); *Smith v. Whitman*, 39 N.J. 397, 189 A.2d 15, 20 (1963). *See also Comment, Good Faith and Fraudulent Conveyances*, 97 Harv. L. Rev. 495 (1983).

16. Although transactions between family members do not, by themselves, render a transaction fraudulent, Utah courts, nonetheless, have often declared that the transactions must be closely scrutinized. *See, e.g., Ned J. Bowman Co. v. White*, 13 Utah 2d 173, 369 P.2d 962, 963 (1962); *Givan v. Lambeth*, 10 Utah 2d 287, 351 P 2d 959, 962 (1960); *Paxton v. Paxton*, 80 Utah 540, 15 P.2d 1051, 1056 (1932).

17. *Cf. Clark v. Second Circuit Court*, 741 P 2d 956, 957 (Utah 1987) (issues deemed tried by consent of the parties); *Industrial Indemnity Co. v. Wick Constr. Co.*, 680 P 2d 1100, 1103 n.1 (Ak. 1984) (findings and conclusions demonstrate the issues were litigated); *Quillin v Hesston Corp.*, 230 Kan. 591, 640 P.2d 1195, 1196 (1982) (issue was considered by trial court even though not specifically raised by the parties).

18. *See Jensen v. Eames*, 30 Utah 2d 423, 519 P 2d 236, 239 (1974); *In re Grooms*, 13 Bankr. 376, 379-83 (D. Utah 1981). *See also Koch Eng'g Co. v. Faulconer*, 239 Kan. 101, 716 P.2d 180, 185 (1986). Once again, as one of its principal arguments on appeal, TSL contends that the trial court improperly allocated the parties' respective burdens of proof. TSL claims that a plaintiff may create a presumption of fraudulent intent by establishing the presence of badges of fraud. Once this occurs, TSL asserts that the defendant then bears the burden of proof to rebut such a presumption. Although it is arguably a matter of semantics, we find the more accurate terminology is that once a plaintiff establishes by circumstantial evidence or otherwise, an inference that the defendant harbored actual intent to defraud, the burden of coming *forward* with rebuttal evidence, not the burden of *proof*, shifts to the defendant. *Compare Koch*, 716 P 2d at 186, *with In re Grooms*, 13 Bankr. at 383.

19. *See, e.g., Gabaig v. Gabaig*, 717 P 2d 835, 838 (Ak. 1986); *Gifford-Hill & Co. v. Stoller*, 221 Neb. 757, 380 N.W.2d 625, 630 (1986) (provided by statute).

20. *Dahnken Inc. of Salt Lake City v. Wilmarth*, 726 P.2d 420, 423 (Utah 1986) (quoting *Givan v. Lambeth*, 10 Utah 2d 287, 351 P.2d 959, 962 (1960)). *See also Boccalero v. Bee*, 102 Utah 12, 126 P.2d 1063, 1065 (1942).

21. *Montana Nat'l Bank v. Michels*, 631 P 2d 1260, 1263 (Mont. 1981)(quoting *Humbird v. Arnet*, 99 Mont. 499, 44 P 2d 756, 761 (1935)).

22. *Id.* (citing 37 Am. Jur. 2d *Fraudulent Conveyances* §10 at 701 (1968)). *See also Gabaig v. Gabaig*, 717 P.2d 835, 839 (Ak. 1986); *Koch*, 716 P 2d at 184; *Morris v. Holland*, 529 S.W 2d 948, 953 (Mo. Ct. App. 1975); *Gifford-Hill & Co. v. Stoller*, 221 Neb. 757, 380 N.W.2d 625, 630 (1986).

23. *Cf. Reliable Furniture Co. v. Fidelity & Guar. Ins. Underwriters, Inc.*, 16 Utah 2d 211, 398 P.2d 685, 688 (1965); *Conder v. A.L. Williams & Assocs., Inc.*, 739 P.2d 634, 637 (Utah Ct. App. 1987) (both cases reverse summary judgments in fraud cases on the basis of material issues of fact).

Cite as
118 Utah Adv. Rep. 64

IN THE UTAH COURT OF APPEALS

Patrick R. DONAHUE,
Plaintiff and Appellant,
v.
John C. DURFEE; Delta Valley Foods, a Utah corporation; Larry Howell; Utah Power & Light Company, a Utah corporation; ABCO Construction Corp., a Utah corporation,
Defendants and Respondents.

No. 880227-CA
FILED: September 28, 1989

Third District, Salt Lake County
Honorable Pat B. Brian

ATTORNEYS.

W. Brent Wilcox and Edward B. Havas, Salt Lake City, for Appellant

Darwin C. Hansen, Bountiful, for Respondents John C. Durfee and Delta Valley Foods

Robert B. Hansen, Salt Lake City, for Respondent Larry Howell

Before Judges Bench, Garff, and Orme.

OPINION

ORME, Judge:

Plaintiff Patrick Donahue appeals the district court's entry of summary judgment in favor of defendants Delta Valley Foods ("DVF"), John Durfee, and Larry Howell. Donahue filed this negligence action seeking to recover damages for injuries he suffered when he contacted an electrical power line while installing a rain gutter on DVF's warehouse. The district court concluded the power line constituted an open and obvious danger and, accordingly, DVF, Durfee, and Howell owed no duty to warn Donahue of the danger or otherwise protect him from it. We reverse and remand.

FACTS

Summary judgment is proper only where "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." Utah R. Civ. P. 56(c). "In reviewing a summary judgment, we analyze the facts and inferences in a light most favorable to the losing party." *Copper State Leasing Co. v. Blacker Appliance & Furniture Co.*, 770 P 2d 88, 89 (Utah Ct. App. 1988). Accordingly, we set forth the facts as contended by Donahue.

John Durfee, DVF's general manager, hired Larry Howell, a steel building salesman, to organize the construction of a new warehouse

for DVF. Howell's duties included procuring the necessary building materials and locating a suitable contractor. With Durfee's consent, Howell hired ABCO Construction Corp. to erect the warehouse.

By spring of 1982, the warehouse was mostly complete and Howell hired "Mr. Rain Gutter," Donahue's employer, to install a gutter to promote proper water drainage. On August 18, 1982, Donahue was assigned to assist with the DVF warehouse project. Donahue was required to work from atop the warehouse roof, where a 7200 volt high-tension power line operated by Utah Power and Light loomed approximately four to five feet overhead. Apparently, Donahue stood up during the gutter's installation and the top of his head struck the power line, causing a severe electrical shock and his resulting fall from the warehouse roof. Donahue was not warned about the powerline but saw it and perceived the potentially fatal danger which it posed.

In July of 1984, Donahue brought this negligence action against DVF, Durfee, Howell, ABCO, and Utah Power and Light.[1] DVF, Durfee, and Howell moved for summary judgment, contending they owed no duty to warn Donahue or otherwise protect him from the power line as it constituted an open and obvious danger. *See, e.g., Steele v. Denver & Rio Grande W. R.R.*, 16 Utah 2d 127, 396 P.2d 751, 753-54 (1964). The district court agreed and entered summary judgment in favor of the defendants.

Donahue appeals, advancing several related arguments. However, the dispositive issue on appeal is whether the open and obvious danger rule is an absolute bar to Donahue's action under Utah's comparative negligence system. We hold that even assuming the power line was an open and obvious danger, Donahue is nonetheless entitled to have the finder of fact compare his negligence, if any, in encountering the power line with any negligence attributable to the defendants in creating or allowing such a dangerous condition to exist.

We first address this issue as it pertains to Donahue's claim against DVF based on its ownership of the warehouse.

TRADITIONAL APPROACH TO LANDOWNER LIABILITY

Historically, a landowner's duty of care owing to persons entering his or her land varied with the nature of the visit. *See, e.g., Tjas v. Proctor*, 591 P.2d 438, 441 (Utah 1979). *But see Williams v. Melby*, 699 P.2d 723, 726 (Utah 1985) (abandoning the traditional common law distinctions and instead imposing a duty of "reasonable care in all circumstances," at least toward the landowner's tenant). *Accord English v. Kienke*, 774 P.2d 1154, 1156 (Utah Ct. App. 1989); *Gregory v. Fourthwest Invs., Ltd.*, 754 P.2d 89, 91 (Utah Ct. App. 1988). Under the traditional view a landowner has no duty to warn guests of "open and obvious dangers," regardless of the purpose of the visit. *See, e.g., Ellertson v. Dansie*, 576 P.2d 867, 868 (Utah 1978); *Steele*, 396 P.2d at 753-54. This doctrine is commonly known as the open and obvious danger rule, and it precludes an injured guest's recovery against the landowner for any injuries sustained through encountering an obvious risk. The justification for the rule appears to be that encountering an obvious risk is negligence as a matter of law and, at least under a contributory negligence system, a plaintiff who is even only slightly negligent is barred from recovery. An alternative justification is that while a landowner has a duty to warn guests of dangers on his or her property, the landowner's failure to do so is harmless where the danger is readily apparent.

The open and obvious danger rule has been sharply criticized. An often-cited basis for attack is that the rule establishes the landowner's duty of care according to what is known or should be known by the guest. *See, e.g., Keller v. Holiday Inns, Inc.*, 105 Idaho 649, 671 P.2d 1112, 1117 (Ct. App. 1983), *aff'd on other grounds*, 107 Idaho 593, 691 P.2d 1208 (1984). These critics argue that a more logical approach treats the guest's knowledge of obvious danger as bearing only on the reasonableness of the guest's subsequent conduct, not as relieving the landowner of its duty of care. *See, e.g., Keller*, 671 P.2d at 1117 (the open and obvious danger rule does not differentiate between those facts relevant to the landowner's duty of care and those facts establishing a total or partial defense to liability); *Parker v. Highland Park, Inc.*, 565 S.W.2d 512, 521 (Tex. 1978) ("A plaintiff's knowledge, whether it is derived from a warning or from the facts, even if the facts display the danger openly and obviously, is a matter that bears upon [plaintiff's] own negligence; it should not affect the defendant's duty.").

Others have criticized the open and obvious danger rule for ignoring reality. As the Texas Supreme Court observed,

> [t]here are many instances in which a person of ordinary prudence may prudently take a risk about which he knows, or has been warned about, or that is open and obvious to him .... One's conduct after he is possessed of full knowledge, under the circumstances may be justified or deemed negligent depending on such things as the plaintiff's status, the nature of the structure, the urgency or lack of it for attempting to reach a destination, the availability of an alternative,

> one's familiarity or lack of it with the way, the degree and seriousness of the danger, the availability of aid from others, the nature and degree of darkness, the kind and extent of a warning, and the precautions taken under the circumstances ....

Parker, 565 S.W.2d at 520. *See Keller*, 671 P.2d at 1117. Courts subscribing to this view have either completely abandoned the open and obvious danger rule, as did Texas in *Parker*, or, at a minimum, refuse to apply the rule as an absolute bar in actions brought by plaintiffs who, like Donahue, entered the property in connection with their employment duties. *See, e.g., Napoli v. Hellenic Lines, Ltd.*, 536 F.2d 505, 509 (2nd Cir. 1976) (a vessel owner must anticipate that a longshoreman may voluntarily encounter an obvious danger to avoid losing his job); *Brown v. Martin Marietta Corp.*, 690 P.2d 889, 892 (Colo. Ct. App. 1984) (where an employee's duty renders an obvious danger unavoidable, injured employee is not barred as a matter of law from recovery against landowner); *Shannon v. Howard S. Wright Constr. Co.*, 181 Mont. 269, 593 P.2d 438, 440-41 (1979) (where an employee must either forego employment or encounter danger, the obviousness of the danger will not completely bar the employee's recovery for any resulting injury).

A related approach is articulated in the Restatement (Second) of Torts (1965). Section 343A provides that a landowner is not liable for a guest's injuries resulting from an open and obvious danger unless the landowner "should anticipate the harm despite such knowledge or obviousness." A few jurisdictions, apparently including Utah, have seen merit in this approach. *See, e.g., Whitman v. W.T. Grant Co.*, 16 Utah 2d 81, 395 P.2d 918, 920 (1964) ("In order to justify holding that a jury question as to negligence exists, where injury has resulted from an observable hazard, it is essential that there be something which could be regarded as tending to distract the [injured person's] attention or to prevent him from seeing the danger ...."); *Santos v. Scindia Steam Navigation Co.*, 598 F.2d 480 (9th Cir. 1979) (applying Restatement approach under Jones Act), *aff'd*, 451 U.S. 156 (1981); *Scales v. St. Louis-San Francisco Ry. Co.*, 2 Kan. App. 2d 491, 582 P.2d 300, 306 (1978) (a landowner may be liable for injuries suffered by a worker encountering an obviously dangerous condition during periods of foreseeable distraction).

Thus, the open and obvious danger rule is not beyond reproach even within the contributory negligence system from which it arose.

COMPARATIVE NEGLIGENCE AND ASSUMPTION OF THE RISK

Utah has now abandoned its contributory negligence system. Utah Code Ann. §78-27-38 (1987), entitled "Comparative Negligence," provides in part that "[t]he fault of a person seeking recovery shall not alone bar recovery by that person. He may recover from any defendant or group of defendants whose fault exceeds his own." Utah Code Ann. §78-27-37(2) defines "fault" as "any actionable breach of legal duty ... including, but not limited to, negligence in all its degrees, contributory negligence, assumption of risk, ..." We hold that by enacting the above statutory provisions and establishing a comparative negligence system, the Utah Legislature has by necessary implication abolished the open and obvious danger rule as an absolute bar to an injured guest's recovery. Our conclusion is premised on two grounds.

First, the open and obvious danger rule is fundamentally incompatible with a comparative negligence scheme, which requires the finder of fact to allocate liability for an injury based on the relative responsibility of the parties involved. The adoption of a comparative negligence system amounts to an expression by the Legislature that the harsh and inflexible result of total victory or unconditional defeat compelled by the traditional contributory negligence system, including the open and obvious danger rule, is no longer acceptable. As most convincingly articulated by Judge Burnett for the Idaho Court of Appeals,

> [p]rior to the advent of comparative negligence, contributory negligence was an absolute bar to recovery. Thus, it made little difference whether a known or obvious condition excused a land possessor's duty to an invitee, or simply insulated the possessor from liability for any breach of such duty. But under the comparative negligence system, the difference is profound. If duty is not excused by a known or obvious danger, the injured invitee might recover, albeit in a diminished amount, if his negligence in encountering the risk is found to be less than the land possessor's negligence in allowing the dangerous condition or activity on his property. In contrast, if the invitee's voluntary encounter with a known or obvious danger were deemed to excuse the landowner's duty, then there would be no negligence to compare--and, therefore, no recovery. The effect would be to resurrect contributory negligence as an absolute bar to recovery in cases involving a land possessor's liability to invitees.

Keller, 671 P.2d at 1118-19. *See also O'Donnell v. City of Casper*, 696 P.2d 1278,

1281-82 (Wyo. 1985). While the Idaho Supreme Court did not immediately embrace Judge Burnett's entire analysis, *see Keller v. Holiday Inns, Inc.*, 107 Idaho 593, 691 P.2d 1208, 1210-11 (1984) (limiting the basis for court of appeals holding), the court ultimately adopted that view and abandoned the open and obvious danger rule altogether, citing its incompatibility with Idaho's comparative negligence system. *See Harrison v. Taylor*, 115 Idaho 588, 768 P.2d 1321, 1325 (1989). In abandoning the traditional rule, the court noted that "[w]e recognize the role *stare decisis* plays in the judicial process. But we are not hesitant to reverse ourselves when a doctrine .. has proven over time to be unjust or unwise." *Id.* at 1328. We are likewise convinced that the open and obvious danger rule is incompatible with Utah's comparative negligence system and join Idaho and a number of other states in announcing its abandonment.[2] *See, e.g., Cox v. J.C. Penney Co.*, 741 S.W.2d 28 (Mo. 1987) (en banc); *Woolston v. Wells*, 297 Or. 548, 687 P.2d 144 (1984); *Parker*, 565 S.W.2d at 517; *O'Donnell*, 696 P.2d at 1284.

Our second point of analysis is premised upon the fact that the assumption of risk doctrine has been expressly abandoned in Utah as a complete bar to recovery due to its incompatibility with our comparative negligence system. *See* Utah Code Ann. §78-27-37(2) (1987). *See also Moore v. Burton Lumber & Hardware Co.*, 631 P.2d 865, 870 (Utah 1981);[3] *Jacobsen Constr. Co. v. Structo-Lite Eng'g, Inc.*, 619 P 2d 306, 309 (Utah 1980). *Accord Deats v. Commercial Sec. Bank*, 746 P.2d 1191, 1193-94 (Utah Ct. App. 1987). It would defy rationality to maintain the open and obvious danger rule as a complete bar to recovery where the essentially indistinguishable assumption of risk doctrine no longer compels such a result. *See, e.g., Harrison*, 768 P 2d at 1325 (open and obvious danger rule is a corollary to the assumption of risk doctrine and should likewise be abandoned); *Parker*, 565 S.W.2d at 518 (assumption of risk doctrine is inseparable from the open and obvious danger rule). *See also* Utah Code Ann. §78-27-37(2) (1987) (defining "fault" for purposes of the comparative negligence scheme as including "assumption of risk" and "negligence in all its degrees").

Similarly, the Utah Supreme Court has interpreted section 78-27-37(2) to abolish the last clear chance doctrine as a complete bar to recovery.

> It is widely recognized that such doctrines as assumption of risk, last clear chance, and *discovered peril* resemble the old contributory negligence doctrine in that they are "all or nothing" doctrines in terms of recovery by the plaintiff ...
>
> [T]here seem to be no good reasons to retain [the last clear chance] doctrine which was originally devised because of another doctrine, i.e., contributory negligence, which the state of Utah has statutorily abolished as an absolute bar to recovery.

Dixon v. Stewart, 658 P.2d 591, 598 (Utah 1982) (emphasis added). We likewise find no good reasons to retain the open and obvious danger rule as an absolute bar to recovery. The summary judgment against Donahue and in favor of DVF must accordingly be reversed.[4]

JUDGMENT AGAINST OTHER DEFENDANTS

Lastly, we address the summary judgment in favor of Durfee and Howell. Donahue's claim against these two defendants is based on their roles in procuring and supervising the construction of the DVF warehouse, including allowing the active power line to remain so near the warehouse roof while Donahue worked. Apparently, the only basis for summary judgment in their favor was the open and obvious nature of the danger posed by the power line. As we held above, the mere obviousness of danger does not support summary judgment under these facts, and it must also be reversed as to both Durfee and Howell.

CONCLUSION

We reverse the summary judgment and remand this matter for trial or such other proceedings as may be appropriate consistent with this opinion. At trial, the finder of fact must compare the reasonableness of Donahue's conduct under all the circumstances in encountering the power line with the reasonableness of DVF's, Durfee's, and Howell's conduct in creating and allowing the potentially deadly power line to remain so near the warehouse roof, in an activated state, while work was being done on the roof. If any damages are warranted under this analysis, they must be awarded consistent with Utah Code Ann. §78-27-38 (1987), as discussed above. The parties will bear their own costs of this appeal.

Gregory K. Orme, Judge

WE CONCUR:

Russell W. Bench, Judge

Regnal W. Garff, Judge

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1. Donahue entered into settlements with ABCO and Utah Power and Light, and they are not parties to this appeal.

2. The middle ground taken by the Idaho Supreme Court in *Keller*, namely that of recognizing an exception for injured employees rather than rejecting outright the open and obvious danger doctrine, is not without attraction as a more cautious and conservative approach to the law's development.

However, there is no defensible basis for making such fine distinctions in view of our conclusion that the open and obvious danger rule, at least as a total bar to liability, has been legislatively washed away with the enactment in this state of a comparative negligence scheme. And as discussed in the text, the Idaho court reached this very conclusion in *Harrison* only five years after its decision in *Keller*.

3. In *Moore*, 631 P.2d at 868, the Utah Supreme Court also held the defendant landowner was entitled to a jury instruction that he has no duty to warn a business invitee of an obvious danger, but the failure to give such an instruction under the particular facts was held to be harmless error. This result does cast doubt on the propriety of our conclusion here. While our Supreme Court recognized in *Moore* that the assumption of risk doctrine has been abandoned as a complete bar to recovery under sections 78-27-37 and-38, it failed to consider the effect of those provisions on the open and obvious danger rule, most likely because that point was not argued by the parties. 631 P.2d at 870. We believe that had the parties in *Moore* analyzed the open and obvious danger rule in this light, the Court would have held that there are no significant differences between it and the assumption of risk doctrine, abandoning both under our comparative negligence system.

4. Our decision in this case will no doubt narrow somewhat the range of cases involving landowner liability in which summary judgment will be appropriate. However, summary judgment will still be available, even though the landowner will be unable to take refuge behind the open and obvious danger doctrine, in situations where the landowner establishes undisputed facts showing he was not negligent as a matter of law. Such situations include plaintiffs who are solely responsible for creating the dangerous condition on defendant's land. *E.g., English v. Kienke*, 774 P.2d 1154, 1157 (Utah Ct. App. 1989).

Cite as
118 Utah Adv. Rep. 68

IN THE UTAH COURT OF APPEALS

Patrick M. SLOAN,
Petitioner,
v.
BOARD OF REVIEW of the Industrial Commission of Utah, Workers' Compensation Fund of Utah, Rotor Rooter Service, S & S Rooter, and Employers' Reinsurance Fund,
Respondents.

No. 890427-CA
FILED: October 2, 1989

Original Proceeding in this Court

ATTORNEYS:

David H. Schwobe, Salt Lake City, for Petitioner

Erie V. Boorman, Salt Lake City, for Employers' Reinsurance Fund

Mark Dean, Salt Lake City, for Workers' Compensation Fund

Before Judges Davidson, Jackson, and Orme (On Law and Motion).

MEMORANDUM DECISION

PER CURIAM:

This matter is before the court on three motions for summary disposition: the court's sua sponte motion, the Employers' Reinsurance Fund's motion and the Workers' Compensation Fund's motion. The Employers' Reinsurance Fund and the Workers' Compensation Fund both move to dismiss the appeal on the ground that it was not timely filed. Petitioner concedes that the appeal should be dismissed, but urges the court to dismiss the appeal due to lack of a final order.

The Industrial Commission's order from which this appeal is taken adopts the Administrative Law Judge's (A.L.J.) findings of fact but remands for a determination of whether petitioner should receive his medical expenses relating to his 1985 injury. Thus, the dispositive issue is whether the Commission's order is a final appealable order.

Generally, "[a]n appeal can be taken only from entry of a final judgment which wholly disposes of a claim against a party." *Hase v. Hase*, 775 P.2d 943, 944 (Utah Ct. App. 1989). Utah Code Ann. §63-46b-14 (Supp. 1988) provides that an aggrieved party may obtain judicial review of final agency action, except in actions where judicial review is expressly prohibited by statute. The statute further states that a party may seek judicial review only after exhausting all administrative remedies and shall file a petition for judicial review of final agency action. Utah Code Ann. §§63-46b-14 (2) & (3).

In several jurisdictions courts have recognized that generally remand orders in administrative proceedings are not final appealable orders.[1] We agree that an order of the agency is not final so long as it reserves something to the agency for further decision. *See Maryland Comm'n on Human Relations v. Baltimore Gas & Elec.*, 296 Md. 46, 459 A.2d 205, 212-13 (1983); *Texas Gen. Indem. Co. v. Strait*, 673 S.W.2d 334, 336-37 (Tex. Ct. App. 1984).

The order in the present case remands to the A.L.J. for a determination of whether petitioner should receive his medical expenses relating to his 1985 injury. Because the order reserves something further for the agency to determine, we hold that the order of the Commission is not a final appealable order. Consequently, we dismiss the appeal due to lack of jurisdiction in accordance with R. Utah Ct. App. 10(a)(1). Because we dismiss the appeal due to lack of a final order, we